STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2010
v	No. 287791 Mason Circuit Court
CHRISTOPHER BRANDON LATIMER, Defendant-Appellant.	LC No. 07-001878-FC

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b),[1] armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529. Defendant was sentenced to concurrent prison terms of life for felony murder, and 11 years and 6 months to 40 years in prison for each of the armed robbery and conspiracy convictions. We affirm.

Defendant's convictions arise from the murder of Jarrett Barnard, during a robbery attempt perpetrated by defendant, Donquez Haynes (defendant's brother), Anthony Southwell and William Cockream, who conspired to commit the robbery in order to obtain marijuana. The plan called for Southwell to feign the robbery of defendant and Haynes, using defendant's BB gun, while Cockream robbed the intended victim. Before the robbery attempt, defendant provided the BB gun, which resembled a pistol, to Southwell and gave money to Haynes to be surrendered during the feigned robbery, traveled with Southwell and Cockream to retrieve Cockream's gun, made telephone calls to inquire about purchasing marijuana, entered Barnard's residence, with Haynes, to verify the presence of marijuana, and then reentered Barnard's residence with Southwell, Haynes and Cockream, to steal the marijuana from Barnard, at which point Cockream shot Barnard.

[1] Defendant was charged with open murder. MCL 750.318.

On appeal, defendant argues that the trial court erred by denying his motion for a directed verdict, and that the evidence was insufficient to convict him of felony murder, because the evidence did not establish that defendant aided or abetted a murder. We disagree.

This Court reviews a trial court's decision on a motion for a directed verdict de novo, considering the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Lemmon*, 456 Mich 625, 633-634; 476 NW2d 129 (1998); *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). This Court also reviews claims of insufficient evidence de novo, viewing all of the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). All conflicts in the evidence are resolved in favor of the prosecution. *Kanaan*, 278 Mich App at 619; *Terry*, 224 Mich App at 452. And, when evaluating the sufficiency of the evidence presented, this Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003). A prosecutor is not charged with disproving every reasonable theory consistent with a defendant's innocence, but must introduce sufficient evidence to "convince [a reasonable] jury 'in the face of whatever contradictory evidence the defendant may provide.'" *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995).

Initially, we note that defendant's arguments on appeal are premised on a fundamental misconception about the theory of culpability argued by the prosecutor at trial. While the prosecutor argued that defendant could be found guilty of armed robbery and second-degree murder on an aiding and abetting theory, the first-degree murder charge was not so argued. Rather, the prosecutor argued that defendant was guilty of felony murder based on his direct participation in the armed robbery that resulted in Barnard's death. Thus, defendant's assertion that the trial court erred by denying his motion for a directed verdict on the murder charge, and that there was insufficient evidence presented to support his conviction of felony-murder, because the evidence did not support a finding that he possessed the requisite intent of an aider and abettor to felony murder is misguided.

"The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery]." *People v Carines*, 460 Mich 750, 759; 597 NW2d 103 (1999), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995) (alteration in *Carines*). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime, *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001), including malice, *Carines*, 460 Mich at 759. A jury may infer

malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id.* Malice can also be inferred from the use of a deadly weapon. *Id.*

In *People v Bulls*, 262 Mich App 618, 626-627; 687 NW2d 159 (2005), this Court found that a jury could conclude that a series of events, set in force by the defendant, was likely to cause death or great bodily harm where the defendant instigated a criminal transaction by inviting a conspirator to participate in a robbery and encouraging him to use a shotgun during the robbery. The *Bulls* Court found that even though evidence did not show that the defendant handled the weapon during the robbery, he nevertheless "used" the weapon with a conspirator's help to perpetrate the crime, and such "use" supported an inference of malice. *Id*. at 627. The *Bulls* Court thus concluded that the defendant acted with malice, even if he did not know that the conspirator intended to kill the victim, because "defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*.

Here, the evidence demonstrates that defendant planned to rob the victim by having his accomplices feign an armed robbery of defendant and his brother, while also committing an actual armed robbery of the intended victim, who defendant knew and who could, therefore, identify defendant. Plainly, this plan called for a second gun in the hands of Cockream, which Cockream and Southwell retrieved from Southwell's residence while defendant and Haynes waited in the car. Even though there was no testimony that defendant saw Cockream with a gun, Southwell testified that the men specifically went to his home to get the gun before they went to the location of the crime. As explained in *Bulls*, 262 Mich App at 626-627, the requisite malicious intent may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm, including by inviting Cockream and Southwell to participate in the robbery during which it was necessary that Cockream be armed, and the nature of the killing established that it was neither accidental nor done without malice. Therefore, the evidence presented here was sufficient for a reasonable juror to conclude that defendant acted with the requisite malice. Thus, the trial court did not err in denying defendant's motion for a directed verdict.

For the same reasons, the evidence was sufficient for the jury to conclude that the defendant was guilty beyond a reasonable doubt of first-degree felony murder. *Kanaan*, 278 Mich App at 618-619; *Terry*, 224 Mich App at 452. Again, testimony established that defendant planned an armed robbery that required the use of two weapons, gave Southwell a BB gun that looked like a pistol in furtherance of the plan, and was with Southwell and Cockream when the second weapon was obtained. Additional testimony established that defendant made multiple preparatory telephone calls and visited the victim on the day of the killings, permitting a reasonable inference that defendant actively participated in enacting the plan. While defendant denied specific knowledge of the gun used by Cockream, Cockream's possession of the weapon was required to carry out the planned robbery, defendant went with Southwell and Cockream to retrieve that gun, and two witnesses placed him inside the apartment when Cockream drew his weapon. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Finally, trial counsel cannot be faulted for failing to object to the court's failure to provide an adding and abetting instruction along with the elements of first-degree felony murder. Such an instruction would have been at odds with the prosecution's presentation of the case, and there is no evidence that defendant asked for such an instruction. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens